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JOHN T. FEY, Clerk

Supreme Court of the United States

October Term 1956

No. 264 Misc.

ELMER BURKE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

This is a petition for a writ of certiorari to the Court of Appeals of the State of New York, to review an order of that court, entered July 11, 1956, unanimously affirming, without opinion, a judgment of the Court of General Sessions, New York County, rendered December 16, 1955, convicting petitioner, upon a verdict of guilty after a trial before a special jury, of the crime of Murder in the First Degree (N. Y. Penal Law, §1044, subd. 1), and sentencing him to death (1525).*

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* References, unless otherwise indicated, are to pages of the printed record on appeal to the New York Court of Appeals.

The Court of Appeals, by order dated July 11, 1956, set the date of execution for the week commencing August 13, 1956. A stay of execution, pending the determination of the instant application for certiorari was granted by a judge of said court on August 10, 1956.

In the event that this Court denies the present petition, the New York Court of Appeals must, on proper application, fix a new date for execution of the petitioner (see N. Y. Code of Criminal Procedure, §503).

The Proceeding Below

(a) The Indictment

The petitioner was indicted by the New York County Grand Jury on July 1, 1954. The indictment charged that, on or about July 23, 1952, with malice aforethought, he shot and killed one Edward Walsh with a pistol (4, 5).

(b) Proceedings before trial

The petitioner, who had admittedly committed numerous crimes and had acquired considerable notoriety as a result of his apprehension and subsequent escape from jail in Boston in 1954 (see 889-90, 906-7, 919, 931-9, 984, 988-99), was apprehended in South Carolina and returned to New York, arriving September 1, 1955 (1230-3, 41).

On September 2, 1955, the petitioner appeared in the Court of General Sessions, and, after four attorneys had been assigned to defend him, was committed to the city prison (6). A week later, he was arraigned on the instant indictment and pleaded not guilty (*ibid.*). This plea was amended, during the trial, to include a specification of insanity (711-2).

(c) The trial

A motion for a special jury was granted and the trial commenced on November 9, 1955 (21-3, 45). During the trial, which concluded with a verdict of guilty on December 2, 1955, twenty six witnesses were called by the People and seven by the defense, and approximately 1200 printed pages of testimony was taken (10, 1507-8; index pp. iii-vi).

The evidence at the trial established that, in the early hours of the morning on July 23, 1952, the petitioner, the deceased and one "Jumbo" Lancia were together at a bar on Columbus Avenue in Manhattan (293, 303-4, 321-2).

The deceased, known as "Poochy," had been a friend of the petitioner's for some six years (479-81). An argument ensued between the petitioner and Lancia, which was broken up by the deceased, much to the petitioner's annoyance (139-43, 304-10, 573, 578-9). When the group separated, the petitioner hurried down the avenue to another bar, then back up to the deceased's apartment, where he kept a .45 calibre automatic pistol (196-202, 249; 203-11, 276-7; 416-21, 476-7, 504-5, see 949-50).

A few minutes later, the petitioner was seen to return to the first bar, walking hurriedly, and holding his hands to his stomach (211-3, 316-9). Entering the bar, he silently approached the deceased from the rear and, pulling a gun from under his shirt, shot him on the left side of the head (582-3, 669-70). As the deceased fell to the floor, the petitioner made his exit from the premises (213-6, 369-70, 670-3).

The spent bullet, from a .45 calibre automatic pistol, was found by a policeman an hour later behind the bar (514-5). The autopsy, performed the following day, established the cause of death as being from a bullet wound of the skull and brain, the shot having been fired from a gun held only "a few inches away" (180-5).

The petitioner's identity as the killer was established by a number of eyewitnesses to the crime and by other evidence tending in various degrees to confirm the conclusion of his guilt. In fact, the petitioner did not dispute very vigorously his responsibility for the homicide, and, among other matters, admitted ownership of a .45 calibre automatic at the time in question (946-7, 949-50, 986).

The defense consisted of a claim of total amnesia and temporary insanity by reason of an alcoholically-induced "blackout." Through his own testimony, and that of three other witnesses, he contended that, owing to intoxication, he did not remember any events of that morning; and that, since receiving a head injury in his youth, he had frequently experienced "blackouts" of this nature when he drank (720-4, 728-31, 734, 739-40, 797-809, 850-2, 884, 894-6, 904-6, 914-8, 953-5).

A fifth defense witness attacked the credibility of one of the People's witnesses, who had testified about borrowing a pistol from the petitioner and returning it to him shortly before the shooting (832-5, see 404-19).

In rebuttal, the People called nine witnesses. One of these, a detective, told of a statement by the petitioner, after his apprehension and while returning by train to New York, clearly referring to the events which tran-

spired shortly before the shooting, and after his alleged "blackout" (1241-4). Two witnesses testified as to the petitioner's sobriety on the night in question (1130-43, 1191-1200). Three described his lack of intoxication in a 1946 robbery, during which he had claimed to have been drunk (1010-30, 1038-49, 1064-73). Three others gave medical testimony about his mental state, refuting his claim of temporary insanity (1082-1101, 1112-22, 1276-80, 1323-45).

The Questions Presented and the Respondent's Position

The petitioner now contends (Petition, pp. 2-8) that he was denied a fair trial in accordance with the standards of the due process clause of the United States and New York State Constitutions. Three grounds are advanced (*ibid.*, p. 8) as the basis for this contention: first, the trial court's denial of an adjournment or a change of venue because of prejudicial newspaper publicity; secondly, the refusal of the court to set aside the verdict because of allegedly prejudicial security measures in the courtroom; and, finally, the court's denial during the trial of a motion for a mistrial made after certain cross-examination of the defendant by the prosecuting attorney.

Each of the above three questions was raised and decided adversely to the petitioner in the New York Court of Appeals (Appellant's brief, pp. 40-41, 42-51; Respondent's brief, pp. 31-33, 52-55).

The respondent's position is that none of the above questions presented for review constitutes a basis, under the due process clause of the Fourteenth Amendment, for the granting by this Court of a writ of certiorari.

ARGUMENT

No Substantial Question Is Presented.

(a) The motion for a change of venue or an adjournment

This motion was first made on November 4, 1955, and was renewed on November 9th, the first day of the trial (37-8, 46-7). The initial motion was supported by a clipping from the first page of the second section of the Brooklyn Edition of the New York World Telegram of November 1, 1955 (43; defendant's exhibit A on the motion), and by an affidavit of counsel that, by virtue of this article, a hostile attitude in the community had been created precluding the possibility of a fair trial at that time (39-41).

Although conceding that the initial publicity surrounding his arrest two months before the trial had probably subsided (40), defense counsel requested a change of venue to a county well removed from New York City, or, in the alternative, an adjournment of two months (40-1). No evidence other than the above clipping and affidavit was offered to support the contention that a fair trial in New York County was then impossible.

The trial judge quite properly denied the petitioner's motion. In the first place, there was no proof, other than counsel's affidavit, to support the claim that the article had engendered a community hostility [*cf. Barrington* v. *Missouri* (1907) 205 U. S. 483]. Secondly, the initial publicity accompanying the petitioner's apprehension had apparently subsided prior to the trial [*cf. Shepherd* v. *Florida*

(1951) 341 U. S. 50]. Furthermore, the trial court was justified in assuming that the likelihood of prejudice from publicity might be greater in a smaller "up-state" county than in the metropolitan area [see *United States ex rel. Darcy* v. *Handy* (1956) 351 U. S. 462, 76 S. Ct. 965, 973 (dissenting opinion)]. Finally, the petitioner was tried by a special jury, no member of which would, by statutory definition, be eligible who doubted "his ability to lay aside an opinion or impression formed from newspaper reading or otherwise" (N. Y. Judiciary Law, §749-aa, subd. 2). In addition, the jurors and prospective jurors were given specific instructions to abstain from reading newspaper articles (71-2, 86-7).

Under the circumstances, the trial court's denial of the motion for a change of venue or an adjournment was clearly not an abuse of discretion sufficient to constitute a denial of due process [*Leviton* v. *United States* (1952) 343 U. S. 946; *Stroble* v. *California* (1952) 343 U. S. 181; *Buchalter* v. *New York* (1943) 319 U. S. 427; *Barrington* v. *Missouri, supra,* 205 U. S. 483].

(b) The motion to set aside the verdict on the ground of allegedly prejudicial security measures

On the day of sentence, defense counsel moved to set aside the verdict, alleging the existence of a prejudicial atmosphere which he claimed had been created in the courtroom by certain security measures employed during the trial (1514-9). According to counsel's assertions, concerning which he declined to testify but which he offered to prove at a hearing, spectators were searched by court

attendants before being permitted to enter the courtroom, all of which "the jury continuously observed," and upon admittance, spectators were directed to sit on one side of the courtroom, the other side being occupied exclusively by police officers in plain clothes (*ibid.*).

When defense counsel, after stating that he had been aware of these conditions throughout the trial, was asked by the trial court why he had not mentioned them before, he replied that no previous application had been made because he believed "it was obvious to the Court what was happening," and that "the record will speak for itself" (1518-9). This delay, while not dispositive, is of some value in assessing the substantiality of this contention [see *Stroble* v. *California, supra,* 343 U. S. 193-194].

Assuming the truth of the petitioner's assertions, no impropriety or prejudice amounting to a denial of due process could be predicated thereon. In view of the petitioner's history, the above described security measures certainly could not be characterized as unreasonable. And, since his background of armed robbery and prison breaking was revealed at the trial, when he took the witness stand, it is improbable that these security measures would have impressed any new ideas along these lines upon the jury, even had they been aware of the existence thereof.

(c) The motion for a mistrial because of the prosecutor's cross-examination

The petitioner claims that the trial court denied him due process when it failed to grant his motion for a mistrial based on certain cross-examination of him by the prosecuting attorney. The portion of the cross-examination

under attack (1004-7; petition pp. 4-7) consisted of questions concerning the petitioner's possible association with one "Duke Connelly" and his family in South Carolina during 1955, prior to his apprehension in that state. As can be seen from the newspaper article introduced on the motion for a change of venue (43; Exh. A on the motion), which, of course, the jury was not shown, there was reason to suspect that the petitioner had killed one Cribbins, and later the Connellys, while hiding out in South Carolina.

The petitioner, who had previously stated that he would not implicate his friends, refused to answer any questions concerning the Connellys, including whether they were dead or alive, or were friends of his. The prosecutor then asked him how he could implicate them "if they are dead" (922, 1004-7). At this point, defense counsel, who had not previously objected to this line of questioning, interposed an objection on the ground there was no proof that the Connellys were either dead or alive. This objection was sustained, whereupon counsel moved for a mistrial. This the court denied, instructing the jury to "disregard the question and draw no inference from it whatever" (1007).

It is the petitioner's present position that this "innocuous instruction" could not erase from the jurors' minds the "inherent prejudice" resulting from this cross-examination (petition, p. 7).

Although there may be occasions when a prosecutor's conduct is such as to vitiate a conviction [*e.g.*, *Berger* v. *United States* (1935) 295 U. S. 78, 84-9], it is apparent

that the extreme remedy of declaring a mistrial was not called for here.

The subject matter of the cross-examination—whether the petitioner had committed prior immoral and vicious acts while in South Carolina—was a proper attack upon his credibility [*Sawyer* v. *United States* (1906) 202 U. S. 150, 165-167; *People* v. *Sorge* (1950) 301 N. Y. 198, 200-201].

Neither the question specifically objected to, nor the prior questions, were so replete with prejudice as to be beyond curing by instructions. The jury cannot be presumed to have disregarded the court's direction not to draw any inference from the question objected to [see *Opper* v. *United States* (1954) 348 U. S. 84, 95; *Holt* v. *United States* (1910) 218 U. S. 245, 248-250]. As to the other questions, it suffices to note that no request for further instructions was made. If further instructions should have been given by the court, *sua sponte*, this omission was not of sufficient gravity to deny the petitioner a fair trial.

Conclusion

The petitioner's claim that the trial court's denial of his motions for a change of venue or adjournment, for setting aside the verdict, and for a mistrial, violated the due process clause of the Fourteenth Amendment is without merit. Any possible error committed by the trial court in these rulings—and we do not believe that error occurred—could only raise questions of state procedure, not involving a conflict with the federal Constitution.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November, 1956